United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76 - 4212

BRIEF FOR RESPONDENT FEDERAL POWER COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Connecticut Light and Power Company,
Petitioner,

v.

Federal Power Commission,
Respondent,
Candlewood Lake Authority,
Intervenor.

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

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STATEMENT OF THE ISSUE

Whether the Federal Power Commission properly determined that it has licensing jurisdiction over four constructed hydroelectric projects on the Housatonic River in Connecticut, pursuant to Section 23(b) of the Federal Power Act, 16 U.S.C. §817.

REFERENCE TO RULINGS

Under review are two unreported orders of the Federal Power Commission (Commission) issued in Connecticut Light and Power Company, Project Nos. 2576, 2604, 2632 and 2646: "Order Affirming Initial Decision," issued May 24, 1976 (App. 1/111-12); 1/ "Order Denying Application For Rehearing," issued July 23, 1976 (App. 1/125-26). The two orders affirmed and adopted as the Commission's decision the initial decision of the presiding administrative law judge, issued August 19, 1975 (App. 1/77-110).

The issues presented by this review proceeding have not previously been before this Court.

1/ All record page citations are to the three volume joint appendix prepared by petitioner. "App." is used in place of "joint appendix." "0/000" refers to the volume number, followed by the page number. Volume 1 contains pages 1-338; Volume 2, pages 339-675; Volume 3, pages 676-924. The page numbers do not correspond to the certified pagination of the certificate of record in lieu of record, dated November 12, 1976 (App. 1/1-11).

STATEMENT OF THE CASE

This case involves four hydroelectric projects on the Housatonic River in Connecticut which are owned and operated by the Connecticut Light and Power Company (CL&P or petitioner). The four projects have been in operation for some time. Bulls Bridge (No. 2604), which is the farthest upstream from the river's mouth in Long Island Sound, was built in 1903. Rocky River (No. 2632), which includes Candlewood Lake, was built in 1929. Shepaug (No. 2576) was built in 1955. Stevenson (No. 2646) was originally built in 1919, but a fourth generating unit was added in 1936.

In response to a declaration of intention to build Shepaug, filed in compliance with the second sentence of Section 23(b) of the Federal Power Act (Act), the Commission issued a finding on December 24, 1952, reported at 11 F.P.C. 1548 (reproduced in full at App. 3/922), which stated that the interests of commerce would not be affected by Shepaug's construction and operation. The Commission expressly stated that its finding as to Shepaug did not apply to the existing projects on the river. No such finding has ever been made as to them.

In 1966 and 1967, following the Supreme Court's decision in F.P.C. v. Union Electric Co. (Taum Sauk), 381 U.S. 90 (1965), CL&P filed license applications as to the four projects (see App. 1/12-19). On December 27, 1973, following the decision in Farmington River Power Co. v. F.P.C., 455

F.2d 86 (2nd Cir. 1972), CL&P filed applications for withdrawal of the pending applications for license (see App. 1/20-44).

Thereafter, on June 25, 1974, the Commission issued an order (App. 1/53-56) requiring a pre-hearing conference and, if found to be necessary by the presiding judge, a hearing on the sole issue of Commission jurisdiction over the four projects. The conference was held on July 25, 1974. Hearing sessions were held on November 19-22, 1974, and January 7, 1975.

Following the submission of briefs by the parties, the presiding judge issued his initial decision on August 19, 1975. It was adopted without change as the final decision of the Commission by the orders here under review, issued May 24, 1976, and July 23, 1976, respectively.

CL&P filed its petition for review, pursuant to Section 313(b) of the Act, 16 U.S.C. §825l(b), on September 20, 1976.

ARGUMENT

Introduction

A brief orientation to the case may be helpful in light of the several arguments made by CL&P. We emphasize at the onset that there is a single overriding reason for affirming the Commission's orders: that the Commission can be affirmed if there is substantial evidence of past commercial logging on the Housatonic and of past suitability for logging. Finding such evidence sufficient would make unnecessary any consideration by the Court of the additional bases for jurisdiction discussed by the Commission. Moreover, while CL&P argues that the Commission is estopped from asserting jurisdiction based on a finding of "navigable waters," this issue has never been litigated. It follows that any claim of res judicata is groundless.

I. There Is Substantial Record Evidence That The Housatonic River Is "Navigable."

A. A River Used For Logging Is A Navigable Water Of The United States.

This Court has made clear that a river is navigable "if (1) it presently is being used or is suitable for use, or (2) it has been used or was suitable for use in the past, or (3) it could be made suitable for use in the future by reasonable improvements." Rochester Gas and Electric Corp. v. F.P.C., 344 F.2d 594, 596 (2nd Cir. 1965). Rochester is especially important to this case, for it provides a recent discussion of the law of navigation under the Federal Power Act. The relevant statutory language is found in

Section 3(8) of the Act, 16 U.S.C. §796(8):

> "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, * * *.

If a river is found to be navigable, 2/ the first sentence of Section 23(b) of the Act requires that it be licensed by the Commission. Its pertinent language is as follows:

> It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power , to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, * * *, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act.

The Rochester decision is part of a line of cases which deals with the issue of "navigable waters." The classic American case is The Steamer Daniel Ball v. United States, 77 U.S. 557 (10 Wall. 1870), wherein the Supreme Court set out a "navigation in fact" test.

2/ The argument of CL&P that the Commission is estopped from making a present finding that the Housatonic is navigable is refuted in Pt. II; infra.

That is, a river is navigable if it is used or is susceptible to use in its ordinary condition as an actual avenue of commerce. Subsequent cases make clear that a river is navigale if it can be so used upon reasonable improvement.

In United States v. The Steamer Montello, 87 U.S. 430 (20 Wall. 1874), the Court declared (at 441) that "the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted nor the difficulties attending navigation." It stated that "[t]he capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use."

Later, in Economy Light & Power Company v. United States, 256 U.S. 113, 112, (1921), the Court made clear that "[n]avigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages nor need the navigation be open at all seasons of the year, or at all stages of the water." Further, the Court stated (at 124) that obstructions, even those which are artifical, as well as changes in transportation mode which result in a river's disuse for many years do not destroy its status as a navigable waterway.

In United States v. Utah, 283 U.S. 64 (1931), the Supreme Court spoke again of a river's capability for use. It declared (at 82) that the question of susceptibility, rather than manner or extent of actual use, is crucial and that uses "of a private nature" can be relied on "as being relevant upon the issue of" susceptibility of a river to commercial use.

The Supreme Court's most recent decision on this issue is United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940), wherein it established (at 407) that a finding of navigable waters need not be dependent upon a river's ordinary condition. Beyond this, the Court made clear (at 409) that navigability can be found "despite the obstruction of falls, rapids, sand bars, carries or shifting currents." It stated that "absense of use over long periods of years, because of changed conditions, * * * does not affect the navigability of rivers in a constitutional sense." Finally, the Court declared (at 416) that lack of commerical traffic is not "a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation."

Among those cases decided by the Court of Appeals, the decision in Wisconsin Public Service Corp. v. F.P.C. (Tomahawk), 147 F.2d 743 (7th Cir.), cert. denied, 325 U.S. 880 (1945), is especially important. It establishes

that seasonal logging is sufficient by itself to support a finding of navigable waters. 3/ The court there described (at 745) how white pine passed over "a succession of rapids, surging over rocky bottoms filled with boulders." It noted (at 746) that the "log driving season began with the spring freshet." The court declared (at 747) that "it is well settled that the floating of logs, in the course of a continuous movement from one State to another, is interstate commerce, and may be a sufficient use for the purposes of commerce." 4/ Finally, the court declared (at 748) that the record "establishes a long, regular and commercially successful use of the stream for the transportation of logs

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3/ As early as The Montello, supra, 87 U.S. at 441; Utah, supra, 283 U.S. at 79; and Appalachian, supra, 311 U.S. at 411, the Supreme Court suggested that logging can properly be considered in navigability cases.

4/ While the record here establishes that the Housatonic was used to transport logs in "a continous movement from one State to another," this Court in Rochester, supra, at 597-8, declared:

> * * *, we agree with the Commission that actual use of a river for intrastate shipments demonstrates its suitability for use as a connecting waterway for interstate or foreign shipments. Especially is this true where the river runs directly into acknowledged avenues of interstate or foreign commerce, here the Erie Canal and Lake Ontario. [citations omitted]

The Housatonic, of course, runs into Long Island Sound. Moreover, CL&P agrees that the river is navigable from Derby to the Sound (App. 3/799). It follows that substantial evidence of the Housatonic's use in intrastate commerce would, under Rochester, be sufficient grounds for this Court's affirmance of the Commission.

and rafts, and forms a reasonable basis in law for the conclusion that the Wisconsin River was and is a navigable water of the United States."

In 1954, the Court of Appeals of the Seventh Circuit again held that logging is a sufficient basis for a finding of navigability. State of Wisconsin v. F.P.C., 214 F.2d 334, cert. denied, 348 U.S. 883 (1954). It referred (at 337), in part, to the decision in St. Anthony Falls Water Power Company v. St. Paul Water Commissioners, 168 U.S. 349, 359 (1897), wherein the Supreme Court found that certain stretches of the Mississippi River were navigable even though parts of them had been used only for logging.

In Montana Power Co. v. F.P.C., 185 F.2d 491, 498 (D.C. Cir. 1950), the Court of Appeals for the District of Columbia Circuit noted that historical evidence is common to cases involving navigable waters:

> Where [an historical work] is the best available evidence, as when the subject matter is beyond the recall of living witnesses, hearsay may be admitted even in judicial proceedings. Thus, it is settled that historical works generally considered authentic are admissible in evidence, especially in cases such as this one which must delve into the relatively ancient and obscure origins of commerce on the nation's rivers. (footnote omitted). At any rate, we do not think the hearsay rule is applicable to administrative proceedings, so long as the evidence upon which an order is ultimately based is both substantial and has probative value.

B. The Record Contains Substantial Evidence That The Housatonic Was Used And Was Suitable For Use To Transport Large Amounts Of Logs.

CL&P attempts to discredit the Commission's finding that the Housatonic was used and was suitable for use to transport logs by segmenting each aspect of the record as to logging and asserting that, standing alone, they do not meet the substantial evidence test (see Br. pp. 34-40). It is clear, however, that the proper standard of review is whether the record as a whole meets the test. See Appalachian, supra.

While the evidence of logging is primarily historical, it is clear that such evidence is proper and adequate.

1. Chester Dewey

The most forceful historical evidence of the Housatonic's use to transport logs is found in a history of Berkshire County, Massachusetts, published in 1829 (App. 1/248-57). In writing of the Housatonic, Chester Dewey declared, "[a]t the commencement of the rise of the waters in the spring, thousands of logs of pine and hemlock, have been thrown into this river, and floated down its current from Great Barrington and Sheffield for years, over the falls at Canaan, to New Milford and Derby, where they have been converted into boards, plank, shingles, etc.

for market in Connecticut and New York" (App. 1/256-57). This is specific proof of point to point floatation of logs in substantial numbers for commercial purposes for years prior to 1829 from as far north as Great Barrington in Massachusetts to as far south as Derby in Connecticut, where after transformation into commercial products some of the wood continued its interstate journey to New York. 5/ Dewey expressly stated that "[t]his trade has carried a very great portion of the pine timber from the south part of the County" (App. 1/257).

CL&P's statement (Br. p. 35) that "Dewey's account is admittedly hearsay" is incorrect. As the record makes clear and as the Commission recognized (App. 1/96), it is not known whether Dewey had first hand knowledge of the facts he described. In any event, the record shows (see App. 1/301-05) that Dewey was a long time resident of the upper Housatonic Valley and was in a position to be an eyewitness of the logging he described. It also shows that Dewey had a "compelling interest in plants, minerals, and the weather which determined the trend of his scientific studies" (App. 1/303) and that he "devoted

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5/ Dewey's statement that wood products were sent from Derby to New York is substantiated by the following passage from a published history of Oxford, Connecticut (App. 1/157):

> "* * * it being recorded that in 1838 packets of 80 tons plied the water weekly between Derby and New York, carrying wood and ship timber, the river having about 10 feet of water at Derby Landing."

his entire life to scientific research, and was considered one of the first of American naturalists" (App. 1/305). Such descriptive terms suggest a man who would be both careful and systematic when writing for publication. It must be remembered as well that he wrote of a specific activity which took place on the Housatonic in his life time near his home. Finally, he was a naturalist who studied the weather as well as riverine plants such as sedges. It follows that Dewey's specific statement of significant, commercial logging on the Housatonic is entitled to considerable weight.

CL&P's suggestion (Br. p. 35) that Dewey may have mistaken accidental floatation of logs for commercial logging is not persuasive. Indeed, the statement of Samuel Orcutt which CL&P sets out as support for this theory substantiates Dewey's statement that the annual spring freshets on the Housatonic carried logs and timbers deliberately sent down the river. Orcutt, for example, did not write of driftwood eventually being taken from the river for use by mills and shipbuilders. His delineated description of "saw-mill logs" and "ship timbers" (Br. p. 35) <u>at the time of their descent</u> supports Dewey's statement that persons upstream of Derby cut logs intended for use by mills and shipbuilders and put them in the river at the most advantageous time of the year for transportation downstream.

CL&P also declares (Br. pp. 35-36):

> [w]hy Dewey would take the trouble to list every important riverside factory or mill site * * * and yet fail to name a single logging site or make even one explicit reference to a commercial logging operation can be explained only by the fact that no commercial logging was done on the river.

The record suggests, however, that logging in Connecticut and Massachusetts was not done in large operations. One contemporary historian, Dr. Joseph Hoyt, in discussing the practice of cutting shipmasts and floating them to the seascoast, explains (App. 1/263):

> Many men tried it and a few succeeded. Lumbering made a good winter job for farmers. The work began after the snow fell and ended with the spring log drive. Probably most of the lumbering in Connecticut was done by part time workers, men who were farmers in the spring, summer and fall, and lumbermen only in the winter.

It follows that the commercial logging described by Dewey may well have been the work of a great many small operations. This, of course, does not distract from his statement that thousands of logs were sent down the Housatonic each spring to the mills at New Milford and Derby. It may, however, explain the apparent absence of records of large logging operations of the type found in other cases (see CL&P Br. p. 36).

2. Samuel Church

Dewey's statement is specifically supported by an 1841 historical address presented by Samuel Church, which was published in 1842 (App. 1/312-16). Referring to a mill on the Housatonic, Church declared (App. 1/316):

> An extensive lumber business was prosecuted. Pine timber in large quantities, and of excellent quality, was by the spring freshets annually drifted down the river from the towns above.

This is an express statement of a particular type, quality, and amount of wood which "was * * * drifted" down the Housatonic each spring for commercial use.

CL&P attempts to discredit this evidence (Br. p. 37), while its credibility is supported by the fact that Church made his statement during an historical address, which itself was later published.

3. Mast Swamp

In 1716 the Indian, Weromaug, conveyed by deed certain land north of New Milford and east of the Housatonic to Benjamin Fayerweather and his associates. The deed specifically stated that it included "tne whole of the Mast Swamp" located near Cornwall Bridge, Connecticut on "said river," referring back to "Stratford Great River," an early name for the Housatonic (App. 1/329). In addition, the deed specifically granted "also ye use and benefit of the said Great River to pass and repass in at any time and at all times with Rafts trees Loogs or What Else so ever without any interruption or molestation forever" (App. 1/330).

Explicit evidence that at some point in time timber on Mast Swamp was cut for "ship masts" and "floated down the river" is found in a 1912 memorandum written by a surveyor from Cornwall Bridge, Connecticut named Silas G. Patterson and sent to Rev. E. C. Starr (App. 1/331).

Mr. Patterson's awareness of detail with respect to such an operation included the fact that "a man was killed when falling one of" the mast trees at a specific location (App. 1/331).

The credibility of Mr. Patterson is supported by the following passage from Rev. Starr's history of Cornwall 6/ which was published in 1926 (App. 1/280):

> The Mast Swamp, * * *, was so named because timber for masts was there cut and floated down the river.

CL&P's witness, Prof. Collier, questioned Rev. Starr's competence as an historian (Br. p. 38), so it is worth noting that Theodore S. Woolsey, in a preface to Starr's book, called him "[a] born antiquary, a sound historical student, * * *". He stated that Mr. Starr "made an important contribution to the long list of local histories of New England" (App. 1/279).

In any event, Rev. Starr's statement as to how Mast Swamp was named is specifically supported by an unpublished manuscript written in 1825 by Rev. Timothy Stone wherein it is stated that "Mast Swamp on the Ousatonic * * * was so called from the great quantity of large and tall white pines, which furnished in former years many masts which

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6/ Patterson's credibility is further supported by the fact that his writings are today considered important enough to be kept as part of the collection of the Cornwall Historical Society (see App. 1/326-32).

were conveyed to the seacoast for shipbuilding" (App. 1/334-35). While Rev. Stone did not say how the masts were conveyed to the seacoast, Prof. Collier has stated that "overland transportation in rugged western Connecticut of the pre-railroad era was not easy" (App. 2/443). Both Mr. Patterson and Rev. Starr, of course, expressly stated that the "many masts" (Rev. Stone's words) cut from Mast Swamp were floated down the river to the seacoast. 7/

It follows that CL&P is mistaken when it argues (Br. p. 38) that the Commission's decision here is based in part on the type of inference found insufficient by this Court in Rochester, supra. There has been no inference drawn from a place name in this case, for as the Commission recognized (App. 1/89) there is specific record evidence of masts being floated downstream from Mast Swamp.

Similarly, the Commission has not relied on the mere inference of another. CL&P (Br. p. 38) incorrectly states that the Commission relied on a statement of Rev. Starr which suggests that he merely inferred from the name Mast Swamp that logging had taken place. In fact, the Commission

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7/ These explicit references to masts being floated down the river make clear that CL&P is wrong in arguing that "there is absolutely no evidence showing that lumber used in [shipbuilding at Derby] was floated down the Housatonic River" (Br. p. 37).

declared (App. 1/89): "Starr stated that logs particularly timber for masts, were cut at the Mast Swamp and floated down the river." This is a clear reference to Starr's statement that (App. 1/191 or 280) "[t]he Mast Swamp, * * *, was so named because timber for masts was there cut and floated down the river." (emphasis added)

4. Connecticut Statutes

In October, 1795 the Connecticut General Assembly enacted a resolution concerning the improvement of a stretch of the "Ousatonuch" generally between New Milford and Newton. The legislature approved the clearing of obstructions from the river and the possible construction of locks and then declared, "[p]rovided nevertheless that nothing in this Act be construed in the least Degree to affect the rafting of Timber and Lumber down the present Bed or Channel of said River * * *" (App. 1/271).

In May, 1807 the Assembly once again enacted legislation dealing with logging on the Housatonic. It passed a statute which declared that so much of an act "regulating the floating of logs and other timber, shingles and staves down Connecticut river, be, and the same is hereby declared to extend to the floating of logs, lumber shingles and staves down the Ousatannick river" (App. 1/318).

CL&P is correct in pointing out (Br. p. 39) that these legislative statements do not specifically declare, as did Dewey, Orcutt, Church, Patterson, and Starr, that saw-mill logs and ship masts were floated down the Housatonic. But it does not follow, as CL&P argues, that (Br. p. 39): "[a]s proof of navigability, [they] have no value;" "nor indeed do they even suggest an unused suitability of the Housatonic River for logging."

On the contrary, these enactments by the Connecticut Assembly necessarily imply commercial logging on the Housatonic. In fact, they suggest that such logging was substantial enough to warrant action by the state legislature on two separate occasions. In 1795, the Assembly had reason to declare that logging on the river must not be interrupted. In 1807, it specifically acted to regulate logging on the Housatonic as it had done earlier with respect to the Connecticut River. Such deliberate legislative action cannot be discounted as being meaningless to this case.

At an absolute minimum, the two statutes must be read as establishing the belief of the legislature that logging of sufficient magnitude and commercial value to warrant protection and regulation by the state was possible. As Rochester, supra, makes clear, such past susceptibility for logging would by itself be enough to warrant a present

finding of "navigable waters" pursuant to Section 3(8) of the Act.

Moreover, the dates of the two statutes (1795 and 1807) correspond with the express statements of logging already discussed. For example, Chester Dewey spoke of logging for years prior to 1829. Samuel Church reported that a saw mill built around 1783 benefitted annually from the large amount of pine timber which was drifted down the Housatonic.

These Connecticut statutes, therefore, are an important part of the body of evidence which establishes that the Housatonic River was used and was suitable for use to transport large, commercially significant amounts of logs.

5. Frank Stowe

While the foregoing discussion concerns logging on the Housatonic in the late 18th and early 19th centuries, there is also evidence that rafting of timber took place as recently as the 1880's. A long time resident of the Housatonic Valley, Frank Stone, wrote 8/ of his experience

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8/ CL&P (Br. p. 36) attempts to discredit the Stowe article by pointing out that it was admitted into evidence "with considerable reluctance." The article, however, is clearly the work of Mr. Stowe, who personally recounted his experiences with respect to rafting and logging activity on the Housatonic. His article is a first-hand descriptive account of actual events. It has a definite place, therefore, in the record of this case. It is clear from reading the article that Mr. Stowe referred to the Housatonic River in Connecticut.

of riding "a raft down the river in Spring freshet time" (App. 1/300). He wrote of "a raft made of chestnut logs joined together with birch binders and fastened with wooden pins * * * [and] loaded either with hewn ties for the rail road or with cord wood" (App. 1/300). He noted that he was well paid and that while "running the rafts" could be dangerous, he "never knew of a fatal accident" (App. 1/300). This as well as his discussion of other trips made by him and his father suggest that such rafting of timber was not uncommon. In fact, he reported that a "pilot, who was supposed to know all the danger spots, ran" a raft on which Stowe's father was riding into a pier of an old bridge near Otter Rock (App. 1/300). While Mr. Stowe did not report where the rafts were put in and taken out of the Housatonic, 9/ his article is

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9/ It is clear that the evidence of logging, if found to be substantial, would establish that the Housatonic is navigable at the four project sites at issue here. In the Rochester case, supra, this Court affirmed the Commission's finding of jurisdiction as to three projects (see 344 F.2d at 597) but not a fourth located farther upstream. No such problem exists here. Dewey, for example, wrote of logs being sent from Massachusetts to Derby, which is downstream from the projects here. The location of Mast Swamp was upstream from the four project sites. Moreover, the 1807 Connecticut statute must be read as regulating logging along the entire length of the Housatonic in Connecticut. All four projects are in Connecticut, within 53 miles of Long Island Sound. See CL&P Br. p. 3.

specific evidence that rafting of timber down the Housatonic took place as recently as the late 1880's.

CL&P (Br. pp. 36-37) completely ignores this aspect of the Stowe article which describes the river's use to transport lumber products downstream during the spring freshets.

Instead, CL&P focuses on an activity which apparently took place in the 20th century (when Stowe was a middle-aged man) and involved the movement of logs directly across the river. The fact that such bank-to-bank floatations of logs may have been unique does not suggest that downstream commercial logging did not exist (see App. 1/300).

6. Summary

The evidence of logging as a whole is fully sufficient to allow this Court to affirm the Commission's decision that it is required to license the four projects because they are located on "navigable waters."

While the evidence here may not be as detailed as that in the two Wisconsin cases on which CL&P relies (Br. pp. 22-23; 36; 39-40), it is clear that the evidence is far more persuasive than that in Leovy v. United States, 177 U.S. 621 (1900), and United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 698 (1899). See CL&P Br. pp. 22; 41-42. The evidence here, for example, establishes that logging was not merely "occasional." It took place annually; for many years the Housatonic was used to transport large quantities of logs and other timber downriver. Moreover, the evidence here is not mere inference, as was the case in Rochester, supra.

Without in any sense conceding the evidentiary issue, we point out that "[u]se of a stream long abandoned by water commerce is difficult to prove by abundant evidence." Appalachian, supra, at 416. Similarly, each case involving the issue of navigable waters is unique and must necessarily be given specific consideration. The judicial "standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are

applied." Appalachian, supra, at 404.

A particular fact in this case is that a great deal of the logging on the Housatonic took place more than 150 years ago. Another is that individual logging operations may have been small in size, i.e. farmers at work during the winter months (App. 1/263). These facts may explain the absence here of detailed records as to the number of men and the amount of lumber involved in logging operations on the Housatonic.

Another consideration, of course, is that rivers vary greatly in size. It is reasonable to assume that the Housatonic did not carry as much timber as, for example, the Connecticut River, but the state legislature nevertheless enacted regulations as to logging on both rivers.

The rule of the Tomahawk decision, supra, is not that certain minimum figures as to men and board feet must be established. Rather, that decision makes clear that a river is navigable if the record "establishes a long, regular and commercially successful use of the stream for the transportation of logs and rafts, and forms a reasonable basis in law for the conclusion that the [river] was and is a navigable water of the United States." 147 F.2d at 748.

Moreover, the Rochester decision, supra, makes clear that a river's past suitability for use as a transporter of commerce, such as logs and other forest products, is

sufficient by itself to support a present finding that the river is navigable.

We respectfully submit that the record as to logging, discussed at length, supra, establishes by substantial evidence that the Housatonic for many years was used and was suitable for use to transport logs and other forest products in substantial and commercially significant numbers. The Commission's decision that the four projects are jurisdictional can and should be affirmed on this basis alone.

C. The CL&P Witnesses Failed To Establish That Logging Could Not Have Occurred.

CL&P's argument (Br. pp. 40-42) that its witnesses did not find evidence of logging or thought it unlikely is nothing more than a negative inference which is rebutted by the express record evidence of logging and susceptibility for logging relied on by the Commission. Moreover, this negative inference is itself highly questionable.

For example, CL&P refers to Prof. Collier's "extensive examination of sawmill account books" (Br. p. 40) as demonstrating that the Housatonic was not used for commercial logging. On cross examination, however, Prof. Collier admitted that "most" of the sawmills involved in his research "were on tributaries to the Housatonic" (App. 2/575) and that "[s]ome account books were fragments and covered a couple of years" (App. 2/576). It is understandable, therefore, that he found "no entry related to the commercial floatation of logs down the Housatonic River"(Br. p. 40) (emphasis added).

CL&P also refers to Prof. Collier's review of certain newspapers (Br. p. 40). He admitted on cross examination, however, that he in fact "scanned" only those newspapers which were available and that "breaks" of as much as eighteen months existed in their "runs" (App. 2/573). CL&P places great emphasis on Prof. Collier's reported failure to find specific proof of navigability. The record demonstrates, however, that others were able to find relevant documents

evidently overlooked by him. For example, while Prof. Collier's bibliography shows that he apparently examined The Public Statute Laws of the State of Connecticut, 1808 (App. 1/136), he did not discover and report in his testimony the 1807 statute, published therein, which extended to the Housatonic the logging regulations originally enacted for the Connecticut River (App. 1/317-18).

CL&P's second witness, Mr. Thorpe, also gives little support to any inference that substantial logging did not or could not have occurred. He offered the opinion that it "is highly unlikely" that the Housatonic "was ever or could ever have been used for log drives" (App. 2/424). Yet, on cross examination, Mr. Thorpe admitted that he has no experience or special knowledge with respect to running logs down rivers (App. 2/533-34).

Mr. Thorpe, a fish and wildlife biologist, is familiar with the Housatonic's physical characteristics as they exist today. He is not qualified, however, to make judgments as to what the loggers of the late 18th and early 19th centuries were or were not able to do to overcome or cope with those physical aspects of the Housatonic which may have impeded log runs.

CL&P (Br. p. 41) implies as well that it is Mr. Thorpe's belief that it is "inconceivable" that logs could have passed a certain area without being destroyed. That is not Mr. Thorpe's view, but rather Prof. Collier's. See

App. 2/447. He has no education or experience in the areas of hydraulics or logging practice. This opinion as to the feasibility of logging is, therefore, groundless.

CL&P suggests (Br. p. 41) that the Housatonic's gradient may have been more severe than, for example, that of the Wisconsin River which was "found to be suitable for logging" in the Tomahawk case, supra. It implies from this that the Housatonic was not suitable for logging. The Court of Appeals in Tomahawk, however, clearly did not establish specific gradient figures as a prerequisite for a finding of navigable waters based on logging. It declared (147 F.2d at 745): "the legal concept of navigability is not to be determined by a formula which fits every type of stream under all circumstances at all times, but prior decisions in this field will be drawn upon and applied in determining whether the particular circumstances render the stream a navigable river of the United States."

Finally, CL&P argues (Br. p. 41) that an apparent absence of logging artifacts along the Housatonic today is evidence that logging did not occur. It must be remembered, however, that much of the original river bed has been inundated since 1900 by the impoundment of water behind the

Bulls Bridge, Shepaug, and Stevenson dams. 10/ Moreover, even Mr. Thorpe has suggested that any artifacts from an era as long ago as, for example, 1800 probably would not survive to present times (App. 2/542-43).

It follows that there is no "substantial evidence indicating the absence of commercial logging on the Housatonic River" (Br. p. 41). Any negative inference in this regard which may have been raised by CL&P's witnesses cannot, in any event, stand in the face of the express record evidence of logging and susceptibility for logging relied on by the Commission. The explicit reports by Dewey and others of substantial yearly log runs and the regulations as to logging on the Housatonic enacted by the Connecticut legislatur establish that the Commission has not relied on "isolated, accidental occurrences of logs floating upon the Housatonic" (Br. p. 41) in finding that the river is navigable within the meaning of Section 3(8) of the Act. Indeed, the evidence here compares favorably to that found sufficient by this Court in the Rochester case, supra, when it affirmed the Commission's finding of navigable waters as to three hydroelectric projects on the basis of past use or suitability for use. See 344 F.2d at 597.

10/ Rocky River is a pumped-storage project which takes water from the Housatonic for storage in Lake Candlewood and eventual release back into the river.

D. Record Evidence of Boating Substantiates The Commission's Finding Of Navigable Waters.

As discussed, supra, this Court may affirm the Commission's finding that the Housatonic is navigable solely on the basis of the substantial record evidence as to logging. There exists, however, additional evidence -- as to boating -- which substantiates the Commission's decision.

In particular, the evidence of boating in the past, even assuming that it was non-commercial, demonstrates that the Housatonic was susceptible for use as a carrier of simple forms of commercial boating. While CL&P highlights much of this evidence (Br. pp. 26-27), it does not provide a particularly significant quotation. The "two honeymooners" (Br. p. 27) referred to by CP&L were required to pack their household belongings into "a stout boat to be rowed and poled up the river this being, at that time, the only means of conveying heavy articles to the settlements above" (App. 1/193).

Because the Housatonic was, at least in 1738, the "only means" of moving "heavy articles" it surely can be said that the river was susceptible for use as a carrier of simple commercial traffic. Utah, supra.

CL&P argues (Br. pp. 28; 29-30) that pre-1776 evidence is not relevant to this proceeding. Its position, however, has no basis in law or in logic. As to the latter, CL&P cannot

seriously suggest that a river's use in, for example, the 40-year period preceding 1776 is not evidence as to its susceptibility for use thereafter.

In any event, CL&P's contention that such evidence of early use cannot be considered in this type of proceeding has no legal basis. The Commission explained (App. 1/80):

> There is nothing in Section 3(8) that even remotely suggests that the movement that evidences navigability must itself be, or have been, in interstate commerce * * *.

Moreover, as the Commission made clear in its decision (App. 1/81):

> * * *, this question is hardly open in light of the reliance of the Court in The Montello, 87 U.S. 430, 432, 440 (1874), inter alia, on the use of a river for the carriage of boats in the fur trade as far back as 1718 and earlier, in deciding the question of navigability.

The Supreme Court also relied on the fact of early movement by explorers and trappers in Economy Light & Power, supra.

CL&P argues that some of the evidence here as to early boating is subject to doubt because, impliedly, it may have been written "without much concern for accuracy" (Br. p. 27). In no sense, however, does CL&P provide any proof, such as conflicting reports, that the published accounts relied on here are not in fact accurate.

As "evidence" (Br. p. 31) that the record here of boating cannot support the Commission's finding that the Housatonic is navigable under Section 3(8) of the Act, CL&P relies, in part, on certain governmental reports which conclude that the river above Otter Rock is not navigable (Br. pp. 32-33). The

Commission explained, however, that reports such as those by the U.S. Army Corps of Engineers do not define navigability, "nor is there any suggestion that the term is used in the sense spelled out by Section 3(8)" (App. 1/93). While such reports may be relied upon in Section 3(8) proceedings, 11/ they do not preclude a finding by the Commission that a river is navigable under Section 3(8). See Appalachian, supra, at 399-401.

It follows that the Commission's finding of navigability in this case is substantiated by the record evidence of past boating on the Housatonic.

11/ If, for example, there is proof of tug and tow traffic such as the Corps of Engineers was concerned with there is no need to determine whether the river was in the distant past susceptible to use by simpler types of boat traffic.

II. The Commission Is Not Estopped From Finding That The Housatonic Is Navigable.

CL&P argues (Br. pp. 13-18) that res judicata bars a present finding that the Housatonic is navigable. Underlying this argument is CL&P's persistent assertion that the Commission may not relitigate the issue of navigability. The argument fails because this issue has never before been litigated. 12/

The first sentence of Section 23(b) of the Act establishes that a party may not construct, operate or maintain a project on navigable waters without a license. If a party believes that the waters on which it intends to construct may be navigable, it is required to file with the Commission an application for license and in such proceeding specifically raise and litigate any claim of non-navigability.

If, on the other hand, a party believes that the waters on which it intends to construct are not navigable, it nevertheless has an independent duty, pursuant to the second sentence of Section 23(b), to file a declaration of intention which places before the Commission the separate issue of whether the proposed project will affect the interests of commerce. 13/

12/ We specifically refer the Court to the Commission's decision in this regard. See App. 1/107-10.

13/ A comparison of the two sentences demonstrates that "navigable waters," while of course involving commerce, is not for the purposes of Section 23(b) included within the term "interests of * * * commerce."

In 1952 CL&P's predecessor filed a declaration of intention, pursuant to the second sentence of Section 23(b), respecting the proposed construction of the Shepaug project. In that proceeding the only recognized issue respecting effect on commerce was whether the proposed project would affect by its hydraulic operation downstream navigable waters. 14/ By filing a declaration of intention, CL&P's predecessor did not place before the Commission the issue of the Housatonic's navigability, for the filing represented the utility's unilateral determination and implicit representation that the river was not navigable.

The Commission in 1952 proceeded to a decision on the issue placed before it. Its finding (App. 3/922) that the Shepaug project would not affect the interests of commerce was nothing more than a determination that the hydraulic operation would not affect downstream navigable waters. The Commission's finding is absolutely silent as to the issue of navigability. The issue was not in any way presented to the Commission; there is no indication that it considered or decided such an issue.

It follows that CL&P's argument of res judicata is groundless. This is demonstrated in part by the fact that the Commission refused to relitigate in this case the issue

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14/ In 1965, the Taum Sauk decision, supra, determined that a second issue is whether the electric power generated by the project will affect interstate commerce.

of Shepaug's effect on downstream navigable waters. See CL&P Br. p. 15. That issue was presented and determined in 1952. The issue of navigability has never before been presented and determined.

The basis of CL&P's argument is that an implied finding of non-navigability "was absolutely essential to" (Br. p. 16) the Commission's express finding that Shepaug would not affect downstream navigable waters. As support for this, CL&P declares that the Commission "was obligated under the Act to determine" (id.) navigability as well as effect on commerce when the project was "submitted * * * to the Commission's scrutiny" (ibid). CL&P concludes simply that the Commission found in 1952 that "a license for the Shepaug Project was not required" (ibid). 15/

CL&P, by this argument, confuses the law and misstates the scope of the 1952 finding. As discussed, CL&P's predecessor chose to file a declaration of intention pursuant to the second sentence of Section 23(b). By that action, it represented to the Commission that the river was non-navigable and that a license based on navigability was not required. By that action, it placed

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15/ In its Statement of Facts (Br. pp. 3-4), CL&P refers to a news release concerning the 1952 finding (see App. 2/352). It is clear that a news release provided for the convenience of the public by the Commission's staff is not an official statement by the Commission itself. Only the language of the 1952 finding, which is officially reported, can be relied on here.

before the Commission the independent issue of whether Shepaug would affect downstream navigable waters. In deciding that issue negatively, the Commission did nothing more than assure the utility that a license was not required under the second sentence of Section 23(b). The 1952 finding did not require a determination as to navigability, and no such decision -- either express or implied -- was made.

CL&P's predecessor did not submit Shepaug to the Commission's general scrutiny. If it had wanted absolute assurance of no licensing liability, it should have also placed the navigation issue before the Commission and sought an explicit finding on that issue. It did not do that, and the Commission made no decision on that issue. The utility constructed and operated Shepaug as its peril in terms of possible exposure to a licensing requirement based on a finding of navigability, for, as CL&P acknowledges, the first sentence of Section 23(b) "categorically requires that a project in navigable waters be licensed" (Br. p. 16).

CL&P attempts to make much of the apparent fact that Commission staff personnel, as opposed to the Commission itself, at least tentatively examined the utility's assumption that the river was not navigable. See Br. pp. 16-17. Even assuming such consideration by Staff, there is no evidence that Staff challenged that assumption

before the Commission. 16/ The 1952 finding is devoid of any indication that the Commission, in any event, considered and determined the issue. Because the issues in 1952 were not the same as those in this case and because there was no necessarily implied finding of non-navigability, CL&P's argument as to res judicata fails.

It follows that the argument as to collateral estoppel (Br. pp. 17-18) also fails. If there was no finding of any kind that the river at the Shepaug site was non-navigable, there can be no argument of any implied finding as to the other three project sites. Moreover, the 1952 finding was expressly limited to the Shepaug project. It cannot in any way be construed to estop the Commission from finding that the Housatonic is navigable at the other sites.

Even assuming a 1952 implied finding that the river was non-navigable at Shepaug, such a finding could not be interpreted as applying to the Rocky River and Bulls Bridge projects which are upstream from Shepaug. It is unnecessary in navigability cases to consider sections of a river upstream from the project site(s) at issue. As the Commission

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16/ It, of course, is material whether any party actually raised the issue of navigability before the Commission. See CL&P Br. p. 16.

explained (App. 1/110) "* * * impediments upstream obviously would not necessarily affect navigability at or below Shepaug." Moreover, a finding of non-navigability as to a downstream section does not necessarily preclude a subsequent finding of navigability as to an upstream section. 17/ The Commission, therefore, would not be precluded by collateral estoppel from finding that Rocky River and Bulls Bridge are on navigable waters.

Because the 1952 decision did not necessarily include an implied finding of non-navigability at Shepaug and clearly made no such express finding, CL&P's argument is reduced to one of equitable estoppel based on the Commission's failure to consider and decide the issue of navigability even though CL&P's predecessor represented that the river was non-navigable by filing a declaration of intention pursuant to the second sentence of Section 23(b). 18/

17/ For example, the fact of logs being run down the upper reaches of a river, removed for milling and, thereafter, transported by other means would establish the river's navigability only as to the section upstream from the mill.

18/ We assume such a duty on the part of the Commission for the purposes of argument in this instance. CL&P provides no authority for its assertion that (Br. p. 18) "the Commission had a statutory duty to determine and assert it jurisdiction" on any possible basis in 1952. The first sentence of Section 23(b) makes clear that it is the utility which is in violation of the Act if it operates an unlicensed project on navigable waters. This surely raises a duty on the part of the utility to obtain an express determination as to navigability, if there is any doubt on the subject. Utilities have been on notice that historical logging is sufficient in itself as a basis for a finding of navigability at least since the Tomahawk decision, supra, issued in 1945.

However, such estoppel does not run against the government. A recent statement of this rule by the Supreme Court is found in U.S. Immigration and Naturalization Service v. Hibi, 414 U.S. 5, 8 (1973):

> It is well settled that the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress.
>
> "As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest . . . . A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it." Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917).

The Commission is here attemtping to enforce the express will of Congress that hydroelectric projects shall not be operated and maintained in "navigable waters" unless licensed. While CL&P is entitled to challenge the Commission's finding that the four projects are jurisdictional on the basis of navigability, CL&P can make no claim in the nature of detrimental reliance. As discussed, supra, its predecessor chose not to raise the issue of navigability for decision at the time Shepaug was proposed. Moreover,

CL&P has been relieved of licensing requirements as to the four projects for many years because the Commission has lacked the necessary resources to fully consider all potentially jurisdictional constructed projects.

Although the issue presented involved the appropriate term of a project license, the following language from the decision in Public Service Company of New Hampshire, Project No. 2288, 27 FPC 830, 833 (1962), is appropriate to the consideration of this case:

> Unfortunately, the Commission has lacked sufficient funds or man power to enforce general compliance with the statute, and as a result a large number of projects, including the one involved in this application, have continued to operate without licenses. If a company whose project has enjoyed three or more decades of unregulated operation were granted a full 50-year license term from date of issuance, it would reap a substantial windfall from its prolonged delay in filing. Equally important, it would obtain an unmerited advantage over those companies which complied at an earlier date, inasmuch as projects of the latter will be subject to federal recapture well within the next 50 years. To the extent feasible, it is the burden of a sound licensing policy to minimize such inequities.

To the extent that the Commission failed to perform any statutory duty of the type suggested by CL&P (Br. pp. 16; 18), its failure was the result of insufficient resources as opposed to any neglect of duty. CL&P may not now in these circumstances raise a claim of estoppel to prevent enforcement of the will of Congress as expressed in the

Federal Power Act. Moreover, any such failure to act in 1952 was in large part the result of the utility's assumption and representation that the river was not navigable. It follows that CL&P may well itself be estopped from arguing estoppel in this case. The Commission's assertion of jurisdiction based on its finding of navigability, therefore, is fully proper and not in any sense subject to estoppel.

Finally, even assuming an implied finding in 1952 of no navigable waters, this Court's recent decision in Greene County Planning Board, et al. v. F.P.C., No. 76-4151, et al., decided December 8, 1976, slip op. at 823, petitions for rehearing pending, declares that the Commission has "an obligation to make corrections when it has been relying on erroneous factual assumptions" and "the new evidence offered, if true, would clearly mandate a change in result." In this case any finding as to non-navigability was at best an implied finding or "factual assumption". The present record establishes that any past assumption of non-navigability was erroneous. The express Congressional intent that projects such as the four in this case (which are being operated on navigable waters) should be licensed would be frustrated if the Commission were prevented from "mak[ing] corrections when it has been relying on erroneous factual assumptions."

III. A Wholely Independent Basis Of Jurisdiction Exists As To The Shepaug And Stevenson Projects.

As discussed, supra, this Court can and should affirm the Commission solely on the basis of its finding that the Housatonic at the four project sites was used and was suitable for use to transport commercially significant amounts of logs and other forest products in interstate commerce. In addition to this finding of jurisdiction based on the fact of navigability, it is clear that the Shepaug and Stevenson projects are jurisdictional because they both involve post - 1935 construction (Pt, III. A, infra) and because the power they generate affects interstate commerce. (Pt. III. B., infra)

A. Construction Of "Project Works" Has Taken Place At Both Stevenson And Shepaug Since August 26, 1935.

As CL&P recognizes (Br. pp. 6-7), an independent basis of Commission jurisdiction exists if a dam or other project works has been constructed at a project after August 26, 1935 (Farmington, supra) and if the power generated by such a project affects interstate commerce (Taum Sauk, supra). No post - 1935 construction has occurred at the Bulls Bridge and Rocky River projects. Shepaug,

of course, is entirely post - 1935 construction, since it was built after 1952. 19/ The only project with respect to which there is an issue as to post - 1935 construction is Stevenson.

The Commission's decision (App. 1/103) that the addition of a fourth generating unit in 1936 constituted construction of project works is supported by substantial evidence. It is in accord with previous decisions and should be affirmed. In no sense can the installation of the fourth generating unit at Stevenson be termed "work in the nature of maintenance, repair, replacement, or modest additions to existing structures" (Br. p. 7).

CL&P's board of directors did not authorize construction of the fourth unit until November 20, 1935. CL&P placed the necessary purchase orders for the turbine and generator on December 23, 1935. The unit's "actual construction" (the words of CL&P's witness, Mr. Ferreira) began in January, 1936 (App. 2/405).

CL&P takes issue (Br. p. 8) with the Commission's statement that the addition of the fourth unit involved "substantial foundation work and installations" (App. 1/103). Mr. Ferreira, however, described the installation process in terms which are not inconsistent with the Commission's

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19/ The decision in Nantahala Power & Light Co. v. F.P.C., 384 F.2d 200 (4th Cir. 1967), makes clear that the Commission is not precluded from asserting jurisdiction over Shepaug on the basis that power it generates affects interstate commerce. Because of the "change in law" provided in 1965 by the Taum Sauk decision, supra, the Commission is not precluded from re-examining its 1952 decision under the second sentence of Section 23(b) that Shepaug would not affect the "interests of * * * commerce."

finding. See App. 2/503-04. He specifically stated that it was necessary for the foundation to be completed before the unit could be put into place.

CL&P argues that the Commission's finding here is inconsistent with previous decisions. With respect to one such case, the Commission determined that the utility had engaged in unauthorized construction when in 1938-39 it installed two additonal units at a project already containing fifteen units. Bangor Hydro-Electric Co., Project No. 2403, 33 FPC 278 (1965). The Court of Appeals agreed that the company should have acted under Section 23(b) when in 1938-39 it "substantially enlarged its hydro-electric project." Bangor Hydro-Electric Co. v. F.P.C., 355 F.2d 13, 14 (1st Cir. 1966). 20/

CL&P's argument that the present case does not compare with Bangor and other cases involving installation of whole new generating units is groundless. In each such instance, not only was the project's generating capacity increased significantly, 21/ but the increase was the result of substantial physical additions to the existing project.

20/ While that case was concerned with "backdating" (the proper effective date of a project license), the finding as to unauthorized construction of project works after August 26, 1935, is fully applicable here, for the latter issue exists independently.

21/ CL&P, of course, freely admits that the addition of the fourth unit increased Stevenson's generating capacity "by about a third" (Br. p. 7).

The Commission's finding of post - 1935 construction at Stevenson, therefore, is not inconsistent with previous decisions. Moreover, there is substantial record evidence as to the nature of the construction as well as the fact that it was not approved and carried out until after August 26, 1935. CL&P has not established that the Commission's decision in this instance should be reversed.

B. The Power Generated By Stevenson And Shepaug Affects Interstate Commerce.

As discussed, both Stevenson and Shepaug were constructed or had project works constructed after August 26, 1935. Because the two projects also generate power which affects interstate commerce (App. 1/103-07), they are subject to Commission jurisdiction, even if the Housatonic is found to be non-navigable or it is determined that the Commission is estopped from asserting jurisdiction based on navigable waters with respect to Shepaug and Stevenson, the only project downstream from Shepaug.

The Commission found, in part or the basis of testimony by CL&P's witness, Mr. Lull, that the Shepaug and Stevenson projects affect interstate commerce because they are part of an interconnected, interstate transmission system and because the electric power they generate does in fact affect interstate commerce. CL&P misstates the Commission's finding and confuses the issue before the Court by arguing (Br. pp. 9-12) that the decision below was based on nothing more than the projects' interconnection with an interstate transmission system. The Commission did not base its finding solely upon any "presumption" (Br. p. 10) of effect on commerce.

The Commission posed the relevant issue, in part, by use of the following language (App. 1/105):

> CL&P is part of an interconnected interstate system, and the question is whether by reason of this, without more, the Projects' generation of electric energy affects the interests of interstate commerce.

The Commission completed its statement of the issue with the following language (id.):

> * * *, in a system with interstate sales and transmission, every generating facility affects interstate commerce: holding aside the question whether a specific generating facility supplies any out-of-state loads, if the system is exporting energy beyond state lines and that facility is not generating, other facilities must generate more, if it is generating, other facilities need generate less; if the system is importing energy and that facility is not generating, the system must import more, if the facility is generating, the system needs to import less (Tr. 166-167) [emphasis added].

The transcript citation in this quotation (App. 2/474-75), is to the testimony of Mr. Lull on behalf of CL&P. This testimony as well as exhibit numbers one through five (App. 1/127-31), which were prepared by Mr. Lull or under his direction, demonstrate that the operation of Stevenson and Shepaug, along with the other two projects, affect interstate commerce by affecting the volume of electric power flowing in interstate commerce. 22/ It follows, as

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22/ In his direct testimony, Mr. Lull identifies Norwalk Harbor, Frost Bridge, Southington and North Bloomfield as "interconnections to other states" (App. 2/391). An examination of the figures set out in exhibit numbers one through four (App. 1/127-30) demonstrates that in each instance an absence of generation by the hydro-electric projects increases the amount of power flowing from these "interconnections to other states." Mr. Lull's testimony on cross examination (App. 2/474-75) confirms this fact.

the Commission clearly found by its reliance on Mr. Lull's testimony (App. 1/105), that the projects do in fact affect interstate commerce.

While CL&P's reliance (Br. p. 10) on the decision in Jersey Central Power and Light Co. v. F.P.C., 319 U.S. 61, 72 (1943), fails because that case involved Section 201(b) of the Act, 16 U.S.C. §824(b), as opposed to Section 23(b), 23/ the Commission's finding was not in any event based on the "mere connection" of the projects to an interstate system.

Moreover, the language from the Taum Sauk decison set out by CL&P (Br. p. 11) cannot reasonably be read as precluding the Commission's finding of effect on commerce in this instance. The Supreme Court clearly did not consider the type of effect found here. Indeed, the use of the phrase "may well have no effect on commerce" strongly suggests an intent not to exclude other possible effects, such as the one demonstrated in this case by Mr. Lull's testimony and exhibits.

Finally, CL&P argues (Br. pp. 12-13) that any effect on interstate commerce caused by the projects' generation of power would surely be de minimis. This argument is rebutted by an examination of the four exhibits sponsored

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23/ See the Commission's distinction of the language in the two sections - App. 1/104.

by Mr. Lull (App. 1/127-30), 24/ which demonstrates that the projects' operation causes a fluctuation, in terms of the amount of power moving through each interconnection point with other states, of several thousand kilowatts.

This clearly is not a de minimis effect on commerce. It follows that the Commission's finding that the projects affect interstate commerce by affecting the amount of power flowing in interstate commerce was fully proper. It was based on substantial evidence presented as part of CL&P's case as well as the relevant decisions discussed by the Commission (App. 1/105-06). Because the finding was not precluded by any previous decision, it should be affirmed by this Court.

24/ Mr. Lull makes clear in his direct testimony (App. 2/389) that the numerical figures on the four exhibits represent megawatts.

IV. Intervenor Candlewood Lake Authority Raises Issues Extraneous To This Review Proceeding.

The sole concern of this case is whether the Commission has licensing jurisdiction over four constructed hydroelectric projects. As a result, most of the arguments made by Candlewood Lake Authority (CLA) are extraneous to this proceeding. 25/ For example, it refers to a recreation plan for Lake Candlewood, the upper reservoir of the Rocky River project, which, assuming jurisdiction, would possibly be an issue in a subsequent proceeding at the Commission concerning the terms a project license. While CLA's discussion in this regard is not relevant here, a short response in appropriate.

Section 10(a) of the Act, 16 U.S.C. §803(a), requires that all projects licensed "shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan . . . for other beneficial public uses, including recreational purposes; . . ." Because the Commission has for years been charged with this responsibility, it cannot be said (CLA Br. p. 4) that recreational planning is not within its area of expertise. Beyond this, CLA cites no authority for its suggestion that the Commission's authority under Section 10(a) is somehow limited to the type of "case where a power project disrupts a wilderness area."

25/ CLA's arguments on the merits are essentially the same as those made by CL&P. They are, as a result, answered by our discussion, supra. CLA does, however, emphasize the statement by the presiding judge that evidence as to navigability was not "overwhelming" (CLA Br. p. 10). In no sense does this mean that the decision here is not based on substantial evidence. See App. 1/126.

CLA speaks of the "nightmarish" prospect of Commission regulation of Candlewood Lake (Br. p. 4). It is clear, however, that CLA would be free in any subsequent licensing proceeding to argue for the type and degree of federal involvement which it feels is appropriate with respect to a project reservoir such as Lake Candlewood. CLA's argument (Br. p. 5) that no Congressional purpose would be served by the assertion of Commission jurisdiction over the Rocky River project, including Lake Candlewood, is in direct conflict with the express terms of the Federal Power Act.

CONCLUSION

For the foregoing reasons, the Commission's decision that the four projects are subject to licensing jurisdiction should be affirmed.

Respectfully submitted,

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Appendix

The Federal Power Act, 16 U.S.C. §§791a, et seq. provides in pertinent part:

SEC. 3. [*As amended August 26, 1935.*] The words defined in this section shall have the following meanings for purposes of this Act, to wit:

Meaning of terms as used.

"Navigable waters."

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority; [41 Stat. 1064; 49 Stat. 838; 16 U.S.C. 796(8)]

SEC. 10. [*As Amended August 26, 1935, September 7, 1962, and August 3, 1968.*] All licenses issued under this Part shall be on the following conditions:

Conditions of licenses.

Project adapted to utilize navigation, water power, etc.

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval. [41 Stat. 1068; 49 Stat. 842; 16 U.S.C. 803(a)]

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(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws. [41 Stat. 1075; 49 Stat. 846; 16 U.S.C. 817]

Dams, etc., over other than navigable waters. License required if interests of commerce affected thereby.

Permission if not affecting commerce.

Declaration of policy.

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. [49 Stat. 847; 16 U.S.C. 824(a)]

Application of Part to transmission and sale in interstate commerce. Wholesale sale of energy.

Regulation by Commission, if no State provision therefor.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.[1] [49 Stat. 847-848; 16 U.S.C. 824(b)]

Exportation of hydroelectric energy.

Jurisdiction of Commission.

Commission has no jurisdiction over generating facilities, etc.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States. [49 Stat. 848; 16 U.S.C. 824(c)]

What constitutes "interstate transmission."

(d) The term "sale of electric energy at wholesale" when used in his Part means a sale of electric energy to any person for resale. [49 Stat. 848; 16 U.S.C. 824(d)]

"Wholesale sale of energy."

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part. [49 Stat. 848; 16 U.S.C. 824(e)]

"Public utility."

[1] See section 272 of the Atomic Energy Act of 1954, on p. 168.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. [49 Stat. 848; 16 U.S.C. 824(f)]

Provisions in this Part not applicable to United States, States, or agencies or corporations of either.

REHEARINGS; COURT REVIEW OF ORDERS

Rehearings.

SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon

Applications for rehearing shall set forth grounds upon which based.

such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any orders of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this act.[5] [49 Stat. 860; 72 Stat. 947; 16 U.S.C. 825l(a)]

Commission may grant or deny application.

Application automatically denied unless Commission takes action thereon within 30 days.

Application for rehearing must precede application for court review of order.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States[6] for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of

Review of Commission orders by Circuit Court of Appeals.

Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code.[7] Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify,

Petition for review must be filed within 60 days after denial of application for rehearing.

Service of copy of petition on Commission required.

Record prepared by Commission and filed with Court.

Upon filing of transcript Court has exclusive jurisdiction to affirm, modify, or set aside Commission order. Only objections urged before Commission shall be considered by Court.

Findings of fact supported by substantial evidence are conclusive.

Additional evidence may be adduced before Commission upon leave of Court.

Commission may modify its findings by reason of such evidence.

Modified or new findings to be filed with Court. Judgment or decree of Court shall be final subject to review by Supreme Court.

or set aside order in whole or in part.[8] No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were unreasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).[8] [49 Stat. 860–861; 16 U.S.C. 825l(b)]

Order of Commission is not stayed by application for rehearing or petition for review.

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [49 Stat. 861; 16 U.S.C. 825l(c)]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4212

The Connecticut Light and Power Company,
Petitioner,

v.

Federal Power Commission,
Respondent,

Candlewood Lake Authority,
Intervenor.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the Commission's brief by mailing printed (offset) copies to counsel listed below:

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